UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JUDICIAL COMPLAINT

Chief Judge Order

Complainant	A
Complainee	D
Reference	24:01
Order date	2nd March 2024

1. Mr A files this complaint with the court against Judge D. He is counsel for the defendant in a case before Judge D. He alleges that, in essence, Judge D ("Judge D") failed to properly research the default and contempt orders in that case, lacks knowledge in the law, and so improperly entered an order adverse to the complainant.

2. This complaint is governed in essence by the Judicial Conduct and Disability Act ("JCDA"), 28 U.S.C. §§ 351–364, superseded in part by the Federal Courts Administration Act ("FCAA"). They are supplemented by the national rules, see *Guide to Judiciary Policy*, Vol. 2E, Ch. 3. This Court is yet to adopt local rules, although we refer persuasively to those set out by the District of Columbia Circuit here. Mr A complains of alleged professional insufficiencies on the part of Judge D. He produces, along with a brief statement of five bullet points explaining five different ways in which Judge D apparently committed misconduct (misapplying the law in 3 different ways, failing to conduct research, and generally being incompetent), supplemented by a petition of *certiorari* to the Supreme Court. An appellate brief, however, does not suffice to plead sufficient facts alleging judicial misconduct. *In re Complaint of Judicial*

Misconduct, 630 F.3d 1262 (9th Cir. Jud. Council 2011). When conducting this preliminary stage of the inquiry under Rule 11(a) of the National Rules, we have reviewed the record in the case, as well as relevant judiciary policy, such as the *Guide to Judiciary Policy*, Vol. 2B, Ch. 2.

3. We view all judicial complaints with a careful eye yet open mind. We view these sorts of complaints with a careful eye since many, while they are made in good faith, result from the genuine and understandable yet misguided feeling of injustice, confusing an appeal with a judicial complaint. Sometimes still, alongside motions to recuse and lawsuits against judges, "[i]n the real world", the lure of these means of attacking a judge or his qualifications personally are too hard to resist, and "are sometimes driven more by litigation strategies than by ethical concerns." *In re Kansas Public Employees Retirement Sys.*, 85 F.3d 1353, 1360 (8th Cir. 1996) (quoting *In re Cargill, Inc.*, 66 F.3d 1256, 1262-63 (1st Cir. 1995)). See also *Ocean-Oil Expert Witness, Inc. v. O'Dwyer*, 451 F. App'x 324, 329 (5th Cir. 2011) ("Courts must take care to ensure that motions for recusal are not abused as a litigation tactic."). Since the very calling of a judge is to "form judgments of the actors in those courthouse dramas called trials," *Liteky v. United States*, 510 U.S. 540, 551 (1994) (internal citation omitted), exposing them to the often understandable, and intrinsically human, disappointment and anger of their litigants, "[i]t is essential in all courts that the judges who are appointed to administer the law should be permitted to administer it under the protection of the law, independently and freely, without favor and without fear." *Pulliam v. Allen*, 466 U.S. 522, 532 (1984) (quoting *Bradley v. Fisher*, 13 Wall. 335, 350, n. (1872)).

4. We must also keep an open mind, however, since judges are also human beings. As such we are neither some infallible species, nor entitled to enjoy immunity from or superiority over the law which our fellow citizens entrust us with applying on a daily basis. Like all human beings, judges make mistakes. Some also act in bad faith, out of ignorance, recklessness or in pursuit of personal interests. Judges must not only be diligent, impartial

and respectable citizens, they must furthermore give the appearance of the same. If we as judges were exempt from all accountability, the public confidence in the judicial system, and in consequence the very authority and ability of the judiciary to do its job would collapse.

5. With that in mind, we must remember that an error of law does not *ipso facto* constitute judicial misconduct. Instead, "a misconduct complaint is not an appropriate vehicle by which to challenge the merits of a judge's decision or procedural ruling." *In re a Charge of Judicial Misconduct*, 141 F.3d 333, 336 (D.C. Cir. Jud. Council 1998). It is not an appeal, nor is this complaint affected in any way by the appeal, and its potential merits or demerits. See also *Jud. Conf. Rules for Judicial Conduct and Judicial Disability Proceedings*, Rule 11(c)(1)(B); and 28 U.S.C. § 352(b)(1)(A)(ii).

6. That being said, "a judge's pattern and practice of arbitrarily and deliberately disregarding prevailing legal standards and thereby causing expense and delay to litigants may be misconduct." *In re United States*, 791 F.3d 945, 964 (9th Cir. Jud. Council 2015) (quoting *In re Judicial Conduct and Disability*, 517 F.3d 558, 562 (U.S. Jud. Conf. 2008)), and under the Canon 3(A)(1) of the Code of Conduct for United States Judges, each judge "should be faithful to [the law], and maintain professional competence". Undoubtedly, a judge is not only expected but "are presumed to know the law and to apply it in making their decisions" *Lambrix v. Singletary*, 520 U.S. 518, 532 n.4 (1997). Because admitting "incompetence" in an individual instance alone as a form of misconduct is in essence tantamount to a heightened appellate standard, courts have been sceptical of applying it, see e.g. *In re Charges of Judicial Misconduct*, 404 F.3d 688, 699 (2d Cir. Jud. Council 2005). Whilst a complaint grounded on incompetence is a matter of first impression in the Federal judicial system, State judicial discipline authorities tend to require either (i) a prolonged pattern of incompetence which shows reckless disregard for what the law says or for attempting to ascertain it, or (ii) a deliberate, bad-faith refusal to apply the law correctly, *cf. In re Free*, 199 So. 3d 571, 592-93 (La. 2016);

Pellegrino v. Ampco Sys Parking, 486 Mich. 330, 354 n.15 (Mich. 2010). Lastly, of course, we must be mindful that each judge is free to, within reason, administer his courtroom and conduct business as he pleases, that like all men each judge has his habits and his idiosyncrasies, *cf. United States v. Seago*, 930 F.2d 482, 493 (6th Cir. 1991) ("Each judge brings to the bench his or her unique character and mannerisms."), and that no other judge, even hearing a complaint, may intrude into that independence, and after all the Chief Judge is no less fallible or more brilliant in his intellect than any one of his colleagues. Furthermore, it is absurd to suggest that on the day a judge enters office, he must have an encyclopaedic knowledge not only of the law as it is on that day, but also the foresight of knowing what the future will hold for the law. In fact, judges never stop learning. More than that, we think it to be an affirmative axiom of our judicial duty to maintain an open mind and a curious nature such that we may continue to enrich and deepen our understanding of the law throughout our judicial service. As such, whilst it does not impose a subjective competence standard, under Canon 3(A)(1), judges are required at the very least to act with objective *diligence* – that is to say to take such steps as are reasonable in order, where appropriate, to inform themselves about the law.

7. It follows that, wholly distinct of whether or not Judge D erred or not in entering the orders that the complainant asserts are wrongly decided, we follow a three-part process in determining whether or not a judge's failure to act diligently by trying to maintain professional competence falls below that required by the Code of Conduct.

8. We start by considering whether the judge's actions completely fell outside of the scope of his official duties, fell within the scope of his administrative duties, or within those of his purely judicial duties. This distinction is hardly a new one in law, There is, as such what the Supreme Court has termed an "intelligible distinction between judicial acts and the administrative, legislative, or executive functions that judges may on occasion be assigned by law to perform." *Forrester v. White*, 484 U.S. 219,

227 (1988). As such, a personnel action, for instance, *Id.*, at 229, *accord Fields v. Office of Eddie Bernice Johnson*, 459 F.3d 1, 7 (D.C. Cir. 2006), does not enjoy any immunity. We need not investigate that distinction further, however, since here the duties are clearly judicial and not administrative in nature, but need only recall that it is first and foremost to regulate a judge's private conduct – such as the accepting of gifts, or his hearing of cases involving his loved ones — or his administrative conduct which the Code of Conduct seeks to regulate first and foremost, *cf. Williams-Yulee v. Fla. Bar*, 575 U.S. 433 (2015) (upholding State regulation of judicial electoral funding), for they may not properly be treated within the realm of an appeal nor compromise a judge's discernment or independence. Quite to the contrary, such regulations work to protect and advance the independence and probity of the judiciary.

9. Next, we proceed to the objective component, we assess objectively whether or not, under a "reasonable judge" standard, like those applied to lawyers in the ineffective assistance of counsel, *cf. United States v. Pollard*, 416 F.3d 48, 55 (D.C. Cir. 2005) ("The inquiry generally applicable to ineffective assistance of counsel claims [is] Did counsel's representation fall below an objective standard of reasonableness?") (cleaned up), and legal malpractice, see *e.g. Seed Co. v. Westerman*, 832 F.3d 325, 335 (D.C. Cir. 2016) ("The standard of care in a legal malpractice case is the 'degree of reasonable care and skill expected of lawyers acting under similar circumstances.'") (quoting *Morrison v. MacNamara*, 407 A.2d 555, 561 (D.C. 1979)), the complainee judge's conduct is one of a sufficiently competent judge or not. We must be careful at this stage to avoid the urge to conflate the analysis under this part with that under the third prong, since our role here is to establish whether or not there is a need to proceed thereon – if the judge's conduct passes muster on the objective standard, then we need not enter into the complex mechanics of his state of mind, and likewise, if we go straight to the third prong and find that the judge's conduct meets that standard, then we need not assess whether or not his conduct objectively fell below a reasonable standard. To do otherwise is to craft a deferential abuse-of-discretion standard and place a

judicial misconduct complaint in the uncomfortable territory of an alternative of an appeal. Of course, in assessing a judge's conduct, we must recall that judges have no obligation to cite precedent, *Spacecon Specialty Contractors, LLC v. Bensinger*, 713 F.3d 1028, 1055 (10th Cir. 2013) ("Although we cannot violate precedent, we have no obligation to cite it."), and that a judge "is not required to produce 'a full opinion in every case,' and need not expressly address each and every … argument advanced." *United States v. Pyles*, 862 F.3d 82, 84 (D.C. Cir. 2017) (quoting in part *Rita v. United States*, 551 U.S. 338, 356, 127 S.Ct. 2456, 168 L.Ed.2d 203 (2007)), and that nothing therefore requires a reasonable judge to do either. In carrying out this inquiry, we must also be mindful that reasonable judges' opinions may differ widely in the need to carry out, and depth of, any research conducted or of any amount of time devoted to reflection – the Code of Conduct imposes merely a *minimum* standard of diligence and care.

10. Thirdly, we assess subjectively the conduct of the complainee judge. That is to say that on this subjective prong, we must establish either (i) that as the matter presented itself to the complainee at the time, accepting as true his rational appraisal of the situation – we are of course not required to accept a conclusion which is facially frivolous or delusional, or which does not proceed out of any rational thought – could not have led a reasonable judge to determine the level of diligence, and in consequence, research and reflection, employed was appropriate; or (ii) that the complainee did not exercise at least the minimum satisfactory diligence of a reasonable judge either willfully or with reckless disregard to whether or not he was sufficiently diligent.

11. Lastly, we observe that sometimes the conduct of a judge will be so outrageous that the second and third prongs merge. That is where *any* reasonable jurist acting in good faith conceivably could not possibly arrive at the same position in law. For instance, the judge who explains that he will dismiss a racial discrimination case on the strength of *Plessy v. Ferguson*, 163 U.S. 537 (1896), without so much as attempting to develop any

reasons for doing so – we leave out the bizarre yet not *necessarily* misconduct-ful hypothesis of a judge who makes a nonfrivolous argument on the strength of or by analogy to *Plessy* – for instance, will have a hard time justifying his choice. That is not, of course, the case at bar when we accept Judge D's understanding as accurate.

12. Here, the complainant fails to make a facially plausible showing that Judge D did, even assuming all of the bare allegations of the complainant as true, commit misconduct.

13. Firstly, in punishing the complainant, Judge D issued a written order, highlighting firstly his authority to punish the complainant's alleged contempt, 18 U.S.C. § 401(1), and explaining briefly the grounds for holding the complainant in contempt of court. The record of the court furthermore reflects that Judge D held the complainant in contempt of the strength of certain contemporaneous communications of his, including one in the court's foyer threatening Judge D with impeachment. We take judicial notice of the relevant fact that the complainant is a serving Congressman. It is not our job to determine whether or not Judge D correctly interpreted the law in holding the defendant in contempt, or whether doing so was an abuse of discretion or some other error of judgment. Instead, our role is limited only to examining whether or not Judge D exercised reasonable diligence in trying to inform himself about the relevant law. Even if we accept the complainant's statement as true, and assume that Judge D did no further research than that, as a matter of law, it appears difficult for us to find that Judge D did indeed commit judicial misconduct.

14. Next, on the question of default judgment, the issues presented appear similar. The complainant alleges that Judge D erred in entering default judgment then in refusing to grant relief therefrom. Even if we assume the allegation to be true, however, the matter is once again not one for a judicial complaint. The record reflects, and the complainant does not allege otherwise, that the complainee judge was under the impression, whether

true or false, that such a course of action was an appropriate standard practice.

15. We must defer to Judge D's belief, rightly or wrongly, that it is common practice for default to be entered in the circumstances on the record. We take no view (i) on the existence of that alleged practice and (ii) on whether or not, supposing the practice to be true, whether it is a lawful or judicially prudent one. We accept that the Clerk did not enter a default. We accept that the defendant was in fact participating in the proceedings. We accept that the defendant did, in fact, file a response. We accept furthermore that the defendant had serious problems finding and retaining counsel. We accept that the Court should not embark on some exercise of sterile formalism, but apply the law to the action.

16. We accept, without deciding, most unequivocally that "[c]riminal contempt is a crime in the ordinary sense." *Mine Workers v. Bagwell*, 512 U.S. 821, 826 (1994) (quoting *Bloom v. Illinois*, 391 U.S. 194, 201 (1968)). We accept, and every jurist ought to know, without deciding, for it is hornbook law, that "a court's summary contempt power should be invoked only as a last resort." *In re Holloway*, 995 F.2d 1080, 1098 (D.C. Cir. 1993). We accept, without deciding, that as such, "[n]ecessity must bound its limits," *Pounders v. Watson*, 521 U.S. 982, 992 (1997) (quoting *Sacher v. United States*, 343 U.S. 1, 36-37 (1952)), *see also In re Ellenbogen*, 72 F.3d 153, 156 (D.C. Cir. 1995) (Summary contempt power to be exercised only "where instant action is necessary to protect the judicial institution itself.") (quoting *Harris v. United States*, 382 U.S. 162, 165, 167 (1965)). We accept, without deciding, that criminal contempt is "not intended to punish conduct proscribed as harmful by the general criminal laws … [but only] the limited purpose of vindicating the authority of the court. In punishing contempt, the Judiciary is sanctioning conduct that violates specific duties imposed by the court itself, arising directly from the parties' participation in judicial proceedings." *United States v. Dixon*, 509 U.S. 688, 723-24 (1993) (STEVENS, J., plurality) (quoting *Young v. United States ex rel. Vuitton et Fils*, 481 U.S. 787, 800 (1987)). We

accept, without deciding, as a matter of black-letter law, that "[s]ummary adjudication of indirect contempts is prohibited" *Bagwell*, 512 U.S. at 833 (citing *Cooke v. United States*, 267 U.S. 517, 534 (1925)). Lastly, we accept, without deciding, that the calculus of whether conduct was actually in the face of the court is complex, *see e.g. In re Heathcock*, 696 F.2d 1362, 1367 (11th Cir. 1983) (FAY, J., dissenting).

17. All of these, however, are committed to the sound discretion and independent mind of each judge subject to the supervision of courts of appellate jurisdiction. However meagre the satisfaction and confidence that the court of appellate jurisdiction, however well or ill-founded, may inspire in the complainant, the Chief Judge on a judicial complaint is not a substitute for that appellate process, however derisory it may be – it is for Congress to fashion a procedure or remedy, not the Chief Judge on a disciplinary order. Sitting to hear a judicial complaint, we are neither a court of appeals nor a court of impeachment. We know for a fact, but only as all diligent jurists do, that an appellate court may reverse the allegedly infirm decision. We may hypothesise that "the proper subjects for impeachment 'are those offenses which proceed from the misconduct of public men, or, in other words, from the abuse or violation of some public trust.'" *In re Trump*, 958 F.3d 274, 305 (4th Cir. 2020) (WYNN, J., concurring in the denial of rehearing en banc) (quoting The Federalist No. 65, at 338 (Hamilton)). Whilst we do not know whether or not the purported misconduct of Judge D rises to that level or not, and irrespective of any grave misgivings that we may have on that count, we know for a most certain fact that, to put it mildly, it is "none of our business". We may think it to be misguided. We may think it to be unfounded. We may think it to be chicanery. And we may think it to be absurd. We may even, to put it bluntly, think that Congressmen behave like idiots. The Constitution, however, commits the indictment and trial of impeachments to the various organs of Congress. U.S. Const. Art. I § 2 cl. 5 and § 3 cl. 6, and prohibits us from enquiring into how Congress does its business, U.S. Const. Art. I § 6 cl. 1. Nothing in the Constitution prevents Congress from going about its work foolishly. *See N.Y. State Bd. of Elections v.*

López Torres, 552 U.S. 196, 209 (2008) ("The Constitution does not prohibit legislatures from enacting stupid laws.") (STEVENS, J., concurring). A court is accordingly not permitted to enquire into how either does its job, *cf. Nixon v. United States*, 506 U.S. 224 (1993); *Larsen v. Senate, Commonwealth of Pennsylvania*, 152 F.3d 240, 250 (3d Cir. 1998) ("[Impeachment is] of a nature which may with peculiar propriety be denominated POLITICAL.") (quoting The Federalist No. 65 (Alexander Hamilton), at 439 (Jacob E. Cooke ed., 1961) (emphasis in original)); *Sinz v. U.S. House of Reps.*, 2 AA.Dig. _____, 4:23-cv-0035M/QWT (D.D.C. Dec. 3 2023), https://archive.org/details/sinz-v-house-summary-judgment, nor are we allowed to fashion an appellate remedy when Congress has not done so, and as much as "[i]t is emphatically the province and duty of the judicial department to say what the law is" *Canning v. Nat'l Labor Relations Bd.*, 705 F.3d 490, 506 (D.C. Cir. 2013) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)), when a court addresses the soundness of a proceeding within a legislature, "the judicial power extends normally only to controlling the *extrinsic* limits of congressional power," *Sinz*, 2 AA.Dig., slip op. at. 16 (emphasis in original), *accord United States v. AT&T*, 551 F.2d 384, 391 (D.C. Cir. 1976) ("[C]ven on an allegation of infringement of First Amendment rights, the courts [can] not interfere with a subpoena concerning a legitimate area of congressional investigation.") (citing *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 95 S.Ct. 1813, 44 L.Ed.2d 324 (1975)); *United States v. Morrison*, 529 U.S. 598, 607, 120 S.Ct. 1740, 146 L.Ed.2d 658 (2000) ("Due respect for the decisions of a coordinate branch of Government demands that we invalidate a congressional enactment only upon a plain showing that Congress has exceeded its constitutional bounds."); *City of St. Paul v. Chicago, St. Paul, Minneapolis and Omaha Rly. Co.,* 413 F.2d 762, 775 (8th Cir. 1969) ("[W]hen the action of a legislature is within the scope of its power, fairly debatable questions as to its reasonableness, wisdom and propriety are not for determination of the courts, but for the legislative body on which rests the duty and responsibility of decision.") (quoting *S.C. Hwy. Dept. v. Barnwell*

Bros, 303 U.S. 177, 190-191 (1938)). That much is an inherent limit on the judicial power, one owed not to some inconvenient obstruction but out of a self-respecting understanding of the very nature of the judiciary. We must accordingly know nothing of the proportionality of such a response, committed soundly to some body corporate foreign to the judiciary such that it may act as the ultimate check upon the courts, and whilst we may be thankful thus far that we have been able to call our brothers (and sisters) on this bench only sound men committed to the service of their fellow citizen, the Framers knew that they could design no watertight system so as to prevent, on occasion, a corrupt or disreputable judge. Wisely or perhaps unwisely, the Constitution's Framers thought they understood that impeachment ought to be "calculated to bring [offenders] to punishment for crime which is not easy to describe, but which every one must be convinced is a high crime and misdemeanor against government", namely "acts of great injury to the community." 4 *Debates on the Federal Constitution* 113 (J. Elliot ed., 1827) (statement of James Iredell at the Convention of North Carolina). They thought, perhaps wrongly, that the legislature might be best placed to try impeachments, see *Larsen*, 152 F.3d at 251. While issue may quite legitimately be taken therewith, we must remember that "[t]he Framers recognized that the Constitution would 'certainly be defective,' making amendments 'necessary.' [and] [a]s a result, they sought to provide an 'easy, regular and Constitutional way' to adopt such amendments." *Illinois v. Ferriero*, 60 F.4th 704, 710 (D.C. Cir. 2023) (quoting in part 1 *Records of the Federal Convention of 1787*, at 202-03 (Max Farrand ed., 1911)). Whether or not the complainant is right in intimating that the appellate remedies in cases like his unsatisfactory or insufficient, that is a question for Congress. In a properly functioning system of government, our system "calls for internal self-restraint and discipline in each Branch," *United States v. Payner*, 447 U.S. 727, 737 (1980) (BURGER, C.J., concurring), and within each branch each officer and each body corporate ought also have the most perspicacious knowledge of his own duty. Re-deciding cases in the place of a brother judge is not one of them. Congress has conferred unto us

a limited power of judicial regulation, *see generally Hastings v. Judicial Conference of U.S.*, 770 F.2d 1093 (D.C. Cir. 1985), and we are constrained by it. Disregard for such elemental precepts of comity and restraint breeds not a better government in whole, for no man is an angel, but only the supplantation of orderly rules of government by the blind and deleterious pursuit of dominant assertion under the pretended and fallacious authority of law. Doing so does little more than to undermine the confidence of the public in the judiciary, and yet we must remember that "[t]he rule of law, which is a foundation of freedom, presupposes a functioning judiciary respected for its independence, its professional attainments, and the absolute probity of its judges." *López Torres*, 552 U.S. at 212 (KENNEDY, J., concurring). Likewise, while the complainant may or may not be right in complaining that Judge D erred in his judicial decision-making, he must take that complaint before the proper forum, namely the appellate court. Those allegations have no place to be entertained on a personal, disciplinary, proceeding against a judge.

18. The claims presented allege only, and purely, in essence, a fundamental belief that Judge D erred in law. Such errors, however, even if we accept them to be true, are not grounds for a judicial complaint. The complaint is **dismissed**. The complainant may file a petition for the matter to be **reviewed** *en banc* by the District Court upon an application within **fourteen days** from this order to be filed with the Clerk.

SO ORDERED,

2nd March 2024

/s/Newplayerqwerty

CJ USDC DDC